on the amount of costs awarded against a party to an action where there had been delay in payment under the Rules of the Supreme Court 1957 (the predecessor of our present Rules of the High Court 1980) in *Liau Kim Lian* v *Bajuria*.[3] The rule that was under consideration was 11(2) of O 40 which reads:

> Every judgment for the payment of money shall bear interest at the rate of six per cent per annum.

Gill FJ (as he then was) had this to say at p 277:

> The view which we took of the matter was that upon a true construction of O 40 r 11(2) interest is payable where an order directs payment of costs to be taxed. It is to be observed that O 40 r 11(2) speaks of 'every judgment for the payment of money'. The word 'judgment' is defined in s 2 of the Debtors Ordinance 1957 to include 'any decree, order or decision for the payment of money'. Where there is an order for costs, it is enough if the amount of the costs is ascertained on the successful party's bill of costs being taxed by a proper officer of the court, as after taxation a further order for the payment is not necessary. Indeed, an order for payment of costs is tantamount to an order for the payment of such amount of money as may be ascertained on taxation to be the amount of the costs to which the successful party is entitled. To a very large extent, it is similar to a judgment for damages to be assessed. A judgment for damages to be assessed, or for costs to be taxed, carries interest from the date of entry of judgment and not from the date of assessment or taxation (see 22 *Halsbury's Laws of England* (3rd Ed) p 782, para 1662).
>
> For the reasons stated, we allowed this appeal but made no order as to costs. This meant that it would be open to the judgment creditor to enforce payment of the amount due as interest on costs, if he so wished.

In the case of *K* v *K (divorce costs: interest)*[4] the husband by an order of the High Court dated 17 May 1974 was ordered to pay a lump sum to the wife and to pay the wife's costs of the application for ancillary relief. Those costs had been incurred partly in the county court and partly in the High Court. In October 1974 the wife's solicitors lodged for taxation a bill of the costs incurred in the county court and High Court in respect of the ancillary proceedings which amounted to over £34,000. On taxation of the bill the costs were reduced and quantified at £16,651. On 18 August 1975 the registrar ordered the husband to pay those taxed costs within 28 days. The husband paid them on 1 September. The wife claimed interest on the taxed costs from the date of the order for costs, ie 17 May 1974 until the date when costs were paid. It was held, inter alia, that although by the Judgments Act 1838 s 17 a judgment debt carried interest from the time a judgment was entered and, by s 18 of that Act, an order whereby costs were payable was to have the effect of a judgment, the modern practice was that interest on costs ran only from the date when the costs had been quantified, or from the time fixed for payment of the quantified costs. Lord Denning had this to say at p 580:

> [W]e are entitled to apply a little commonsense. Interest should be payable whenever money is 'wrongly withheld' from the one who is entitled to it ... When the sum is unascertained, the debtor cannot be expected to pay it until it is quantified. He cannot make a tender until he knows how much it is. He cannot be said to be 'wrongfully withholding' the money until it is fixed. So in all fairness interest should only run from the date of quantification.

In the present case the judgment creditor has not asked for interest from the date of the judgment as she would seem entitled to on the authority of *Liau Kim Lian's* case[3] but only from the date of taxation, a date which I prefer as being more reasonable. Accordingly I can see no objection to the judgment creditor quantifying the interest on the costs from the date of taxation to the date of payment of the costs by the judgment debtor. In the result the application is dismissed with costs.

Application dismissed.

Solicitors: *Subra Naicker & Co.*

Reported by *PS Ranjan*

Abdul Khoder bin Shafie v Low Yam Chai

HIGH COURT (ALOR SETAR) – CIVIL APPEAL NO 12-03-1987
KC VOHRAH J
12 APRIL 1989

Evidence – Agreed bundle of documents – Purpose – Effect of inclusion of document in bundle – Notes of proceedings in previous case included in bundle – Witness who gave evidence in previous case not called in subsequent case – Whether his previous testimony admissible in subsequent case – Use of statements by witnesses in previous case for impeachment or corroboration in subsequent case – Contradiction of witness by statement made by third party – Evaluation of evidence – Duty of court – Evidence Act 1950, ss 32, 145, 155(c) & 157

Following a highway collision, the plaintiff brought a negligence action for damages in the sessions court against the defendant, alleging that the defendant in his car had negligently encroached into the plaintiff's path and collided with the plaintiff's motorcycle. The defendant's version of the collision was that the plaintiff's motorcycle had encroached into the defendant's path and collided with the defendant's car. The sessions court judge dismissed the claim following the trial. The trial judge had no sketch plan to rely on as it had not been admitted. In reaching his decision, he relied on the notes of the evidence of the investigating officer in a criminal case arising out of the accident (in which the plaintiff was the accused) conducted before a magistrate. The notes had been included in an agreed bundle of documents in the civil action.

The investigating officer was not called to testify in the civil action. No mention was made as to what was agreed upon as regards the bundle. It was conceded by counsel for both parties that the police sketch plan and key were disputed documents at the trial although they were included in the agreed

bundle. The defendant was cross-examined as to discrepancies between his testimony at the trial of the civil action and his testimony in the criminal case. Counsel for the plaintiff had used the evidence of another witness in the criminal case as corroboration of the witness's testimony at the trial of the civil action. The trial judge had relied on the statement of the investigating officer in the criminal case that the rear tyre of the motorcycle was bald and found that the plaintiff had acted dangerously by negotiating a sharp bend on a motorcycle with a bald rear tyre in slippery road conditions 'at a speed' resulting in the motorcycle skidding and going 'to the other side of the road.' The plaintiff appealed.

Held, allowing the appeal:

(1) It was apparent that the purpose of including in the agreed bundle of documents the record of tthe notes of evidence of the criminal case was to dispense with the person, ie the magistrate, who recorded the notes, from coming to court and producing the record. Though the parties did not expressly say what was agreed upon, the clear implication which could be gleaned from the circumstances was that the parties agreed on the record as a document, obviating the necessity of proving the making and authenticity of the document.

(2) Such agreement was not rendering the contents of the record as admissible, being used only for the limited purpose of testing the testimony of witnesses against their own former statements in the same matter for impeachment or corroboration, and the investigating officer not having been called as a witness in the civil suit, his former statement was inadmissible and could not constitute substantive evidence against the plaintiff in the civil suit as the learned judge treated it to be so. The learned judge was clearly wrong in relying on the former statement of the investigating officer as evidence when he was not called as a witness and for relying wholly on such statement to come to the conclusion that the plaintiff had been negligent.

(3) Under s 145 of the Evidence Act a witness cannot be contradicted by previous statements not of himself but of a third party. The witness cannot be told what third persons have said or deposed to and asked if he contradicts them. As it was, the learned judge seized on the statement of the investigating officer that the rear tyre of the motorcycle was bald and made a finding which was not pleaded by the defendant as to the manner in which the collision had occurred.

(4) The trial judge did not consider the plaintiff's evidence at all, merely stating that it was another version of the accident and he considered only cursorily the evidence of another witness for the plaintiff as to how the collision had occurred. The trial judge did not at all evaluate the evidence of the defendant who gave a conflicting version of the accident. Had he done so he would have seen many inconsistencies in that man's evidence inherent therein and when viewed against his former statement given in the magistrate's court. Instead he took a portion of the defendant's evidence as the truth and used it to reject the evidence of one of the plaintiff's witnesses. The defendant's version of the accident was never put to the plaintiff's witness or for that matter to the plaintiff himself. Doubting the plaintiff's witness's credibility without giving proper reasons for doing so did not amount to much.

(5) On the evidence, the accident took place when the car of the defendant collided into the motorcycle of the plaintiff on the plaintiff's side of the road. However, the plaintiff could have avoided the accident and he was equally responsible for the accident. The appeal was to be allowed on the basis of 50-50 liability.

Cases referred to

1 *Yew Len Finance Development (M) Sdn Bhd* v *Tan Ghin Ghong* [1986] 1 CLJ 299 (refd)
2 *Wong Thin Yit* v *Mohamed Ali* [1971] 2 MLJ 175 (folld)
3 *Bobba Bhavamma* v *Bobba Ramamma* 78 IC 176; A 1924, M 537 (folld)
4 *North Australian Co* v *Goldsborough Co* [1893] 2 Ch 381 (folld)

Legislation referred to

Evidence Act 1950 ss 32, 145, 155(c), 157

Ranjit Singh for the appellant.
Visvanathan for the respondent.

Cur Adv Vult

KC Vohrah J: I allowed the appeal against the decision of the judge of the sessions court at Sungei Petani and I now give my written reasons for allowing the appeal.

The judge of the sessions court dismissed the claim of the plaintiff who sought for special and general damages in regard to injuries suffered by him in an accident involving his motorcycle and the defendant's motorcar.

On 30 July 1982 at about 5 pm a collision occurred between a motorcycle ridden by the plaintiff, who was proceeding in the direction of Bedong, and a car driven by the defendant, who was proceeding in the opposite direction. The accident occurred near the junction of Jalan Semeling and Jalan Bedong and along a bend.

The plaintiff contended that the defendant in his car negligently encroached into his path and collided with his motorcycle. The defendant on the other hand gave a conflicting version stating that the plaintiff's motorcycle had encroached into his path and collided into his car.

The judge had no sketch plan to rely on as it had not been admitted. So when he dismissed the plaintiff's claim what he did was to rely on the notes of the evidence of the investigation officer which had been taken down by the magistrate in Sungei Petani Magistrate's Court Arrest Case MAC(B) 414/83 although the officer was not called to testify in the civil suit. He relied on his former statement to the effect that broken pieces of glass were found where the defendant's stationary car was found after the accident and that some particular lamps of the car and the motorcycle were found broken; and based on these he came to the conclusion that the point of impact was at the defendant's right of way and that the plaintiff encroached into the defendant's path; and the judge further relied on his former statement that the rear tyre of the motorcycle was worn off and bald and concluded that, since it had been admitted that it was raining at the time of the accident, 'the plaintiff acted dangerously by negotiating the sharp bend with a bald rear tyre and the slippery road condition at a speed resulted his motorcycle skidded and went to the other side of the road *(sic)*'. Having made

these findings he then rejected the evidence of the plaintiff's witness, PW2, in the suit who said he was riding a motorcycle behind the plaintiff's motorcycle before the accident occurred; this man's evidence corroborated the evidence of the plaintiff that the defendant's car encroached into the plaintiff's path and collided into the plaintiff's motorcycle. The judge rejected his evidence on the ground that he was not an independent witness because 'as a friend he would try to cover the plaintiff's fault'.

It is clear that the learned judge in the face of conflicting versions as to how the accident took place relied on the evidence given by a police officer not before him but given in the magistrate's court to reach his conclusion that the accident took place on the defendant's path. As he clearly admitted, 'without the sketch plan I had no choice but to rely on the evidence of the investigation officer in the traffic case ... which forms part of the agreed bundle of documents'.

The record of the notes of evidence in Sungei Petani Magistrate's Arrest Case MAC(B) 414/83 was in the agreed bundle of documents which the judge used in the civil suit. There is no provision in the Subordinate Court Rules 1980 specifically for the use of the agreed bundle but in the subordinate courts the agreed bundle, especially in running-down claims, is frequently filed in court for the use of the presiding judicial officer hearing the relevant case although it would appear that the agreed bundle was expected to be used only by certain senior judicial officers in the subordinate courts in the seventies, the officers being then known as special presidents of the sessions court (see Practice Note No 3 of 1970, para 4(a) [1970] 2 MLJ xliii). What seems to be the present established practice in the subordinate courts stems from High Court practice. The High Courts rely on Practice Note No 1 of 1969 ([1969] 1 MLJ xii) and Practice Note No 3 of 1970 ([1970] 2 MLJ xliii) as amended by Practice Note No 2 of 1977 ([1977] 1 MLJ xlvi).

Coming back to the appeal at hand. At the trial, the agreed bundle was referred to and marked 'A'. No mention was made as to what was agreed upon as regards the bundle. There should have been an expressed indication by both counsel what they had in mind, what they had agreed about, in tendering the agreed bundle ('A') for use in the trial. What then was the agreement about?

There are three categories of such agreement and this matter has been dealt with in *Yew Len Finance Development* v *Tan Ghin Ghong*[1] at p 302. To my mind, however, it is appropriate to reproduce what has been stated in respect of admission by agreement in 18 *Atkin's Court Forms* (2nd Ed) (1985 issue) para 40 at pp 360 and 361:

> 40 Admission of evidence agreement. Much the most common method of admitting 'written hearsay' in evidence is by agreement. It is in this way that medical reports, police reports, cargo surveys and the like are admitted every day. No particular form is necessary, but it is important that there should be no ambiguity as to what is agreed. There are three types of agreement:
>
> (i) The parties may agree that a statement in a document should be agreed evidence upon the point, neither party being at liberty to controvert it by other evidence. This is the normal understanding when medical reports or the like are 'agreed'. If a party wishes to agree something less, he should make this clear. Where medical reports are incomplete or do not in fact agree, it is desirable that the doctors be called to give supplementary evidence *Jones* v *Griffith* [1969] 1 WLR 795 (CA); *Mullard* v *Ben Line Steamers Ltd* [1970] 1 WLR 1414 (CA); [1971] 2 All ER 424.
>
> (ii) The parties may agree that a statement in a document should be admissible in evidence, each of them being at liberty to controvert it by other evidence. This is seldom a wise form of agreement, unless, of course, the maker of the statement cannot be called as a witness, when it may be unavoidable. If there is to be controversy and the maker of the statement is available, he should be called. In particular the court will often refuse to decide a controversy of medical or scientific opinion on written statements. Accordingly, it is wrong for the parties to 'agree' medical reports from doctors who differ on a point of substance.
>
> (iii) The parties may agree document as a document. This dispenses with proof of its making and authenticity, but does not make it admissible.

The agreed bundle ('A') in the instant case comprises five documents; there are copies of two police reports (one by a police officer and the other by the defendant) relating to the accident, a copy of a sketch plan and its key, a copy of a medical report of the injuries suffered by the plaintiff, and a copy of the notes of evidence of the trial in the magistrate's court.

Now, it was conceded by both counsel that the sketch plan and key were disputed documents at the trial although it was included in the agreed bundle. The judge in fact lamented the fact that he could not rely on the sketch plan. In regard to the other documents relating to the police report made by the defendant they were referred to at the trial without any objection. There was objection to the use of the medical report but it was ruled admissible under s 32 of the Evidence Act. As for the police report made by the police officer it was not at all referred to at the trial.

In regard to the record of the notes of evidence contained in the agreed bundle the references to it by both counsel were for the fairly specific purposes to which I will be alluding shortly. The record relates to notes of evidence made by the magistrate at the trial of the plaintiff who was the accused in respect of a traffic offence relating to the same accident. He was acquitted at

the close of the prosecution's case after five witnesses had testified against him. Two of the witnesses were the defendant in the civil suit and one Shoib bin Salam who subsequently testified for the plaintiff's case in the civil suit. The other three were police witnesses. One of them was the investigating officer of the case. Another was one who prepared the sketch plan of the accident scene and yet another was one who took a police report from the plaintiff. And references by both counsel during the civil trial were only to the former statements at the criminal trial made by the defendant in the civil suit, Shoib, and the investigating officer.

The defendant was cross-examined by the plaintiff's counsel as to discrepancies between his testimony at the trial of the case and his former statement in the magistrate's court and clearly the use of certain parts of the man's former statement was to impeach the credit of the defendant, permissible under ss 145 and 155(c) of the Evidence Act 1950. It is also clear that the former statement of the defendant in the criminal case does not become substantive evidence for the purposes of the civil suit (see the Federal Court case of *Wong Thin Yit* v *Mohamed Ali*[2] at pp 178 and 180).

Shoib's former statement made in the magistrate's court was made use of by the plaintiff's counsel, obviously as corroboration under s 157 of the Evidence Act 1950 of his testimony at the civil trial. Again the former statement does not constitute substantive evidence (see *Wong Thin Yit*[2]). From the use of the former statements of both the defendant in the civil suit and Shoib as stated earlier, it is apparent that the purpose of including the record of the notes of evidence containing these statements in the agreed bundle was to dispense with the person, ie the magistrate, who recorded the notes, from coming to court and producing the record. And looking at the nature of evidence of those witnesses who gave evidence as police officers on behalf of the prosecution at the criminal trial, it can hardly be said that counsel for the plaintiff would have agreed to the admission of the statements of these police witnesses as evidence in the civil suit, especially the statement of the officer who drew and explained the sketch plan (when the sketch plan was a disputed document) and the statement of the investigating officer where the evidence he gave in the magistrate's court appears inimical to the interests of the accused (the plaintiff in the civil suit). There was confusion at the trial before the judge as to the status of the various documents in the agreed bundle. Defence counsel, as earlier stated, objected to the admissibility of the medical report although included in the agreed bundle, but the judge ruled it admissible under s 32 of the Evidence Act 1950 probably on the ground that the doctor who made it is dead. And while the sketch plan and key were in the agreed bundle they were treated as disputed documents. The former statements in the record of evidence were resorted to in order to corroborate or discredit witnesses and the statement of the investigating officer was used in cross-examination of the plaintiff to contradict him although the plaintiff himself did not make the statement. (I shall discuss this aspect later.) And to my mind the record of the notes of evidence is merely a document which falls within the third category of agreement earlier mentioned. Though the parties did not expressly say what was agreed upon, the clear implication which can be gleaned from the aforesaid circumstances, to my mind, was that the parties agreed the record as a document, obviating the necessity of proving the making and authenticity of the document.

Such agreement not rendering the contents of the record as admissible, being used only for the limited purpose of testing the testimony of witnesses, ie the defendant in the civil suit and the plaintiff's witness, Shoib, against their own former statements in the same matter for impeachment or corroboration, and the investigating officer not having been called as a witness in the civil suit, his former statement is inadmissible and cannot constitute substantive evidence against the plaintiff in the civil suit as the learned judge treated it to be so. The learned judge was clearly wrong for relying on the former statement of the investigating officer as evidence when he was not called as a witness and for relying wholly on such statement to come to the conclusion that the plaintiff was negligent.

One other matter in regard to the statement of this officer contained in the agreed document. The officer's statement as to his finding the back tyre of the plaintiff being bald was used by defence counsel in the cross-examination of the plaintiff to contradict the plaintiff when that plaintiff claimed his back tyre was not bald. This was clearly wrong. Under s 145 of the Evidence Act a witness cannot be contradicted by previous statements not of himself but of a third party (see *Bobba Bhavamma* v *Bobba Ramamma*[3]). The witness cannot be told what third persons have said or deposed and asked if he contradicts them (*North Australian Co* v *Goldsborough Co*[4]). As it was, the learned judge seized on this statement of the investigating officer that the rear tyre of the motorcycle was bald and made a finding which was not pleaded by the defendant that 'the plaintiff acted dangerously by negotiating the sharp bend with a bald rear tyre and the slippery road condition at a speed resulted his motorcycle skidded and went to the other side of the road *(sic)*'. The defendant himself stated in his evidence at the trial that the plaintiff's motorcycle, the second in a line of four or five motorcycles, encroached on to his path and fell after the first motorcycle (which was 10 to 20 ft ahead of the plaintiff's motorcycle) had fallen, the implication being that the plaintiff, in order to avoid the first fallen motorcycle, had encroached onto his path.

Before I pass on to another matter I would like to note that the defence counsel, in his written submission to the judge of the sessions court, requested the judge to refer to the sketch plan and key although he acknowledged in the submission, in the same breath, that they were disputed documents (see p 62 of the session court's appeal record). Why he did that I find it difficult to understand but whatever the reason he may advance for making such a request it only helped further to confuse the status of the documents in the agreed bundle.

The learned judge said he did not rely on the sketch plan. Instead he relied on the inadmissible statement of the investigating officer to come to his finding that the point of impact was on the defendant's right of way and that the plaintiff riding his motorcycle with a bald rear tyre acted dangerously by negotiating the sharp bend which was slippery after the rain at a fast speed as a result of which the motorcycle skidded and went to the other side. This matter of negotiating a wet slippery bend on a bald tyre at a speed was not pleaded by the defendant and in my view the finding of the judge was a matter of conjecture. The judge instead should have considered the plaintiff's evidence. He did not at all do so, merely stating that it was another version of the accident.

The evidence of the plaintiff was that as he took the bend at about 30 to 40 mph he saw the car encroach onto his path; the car was not travelling fast; one of its tyres had crossed the centre white line. He tried to avoid the car by swerving to his left and at the time of the collision half of the car body had encroached onto his path. He denied he skidded into the defendant's path and he denied he was telling lies. It will be noted that the defendant's story was not put to the plaintiff about there being four or five motorcycles proceeding along the road in single file just before the accident and that his (the plaintiff's) motorcycle was the second one in the line of motorcycles, and that the first motorcycle in the file fell down and that as a result the defendant's motorcycle also fell down and went on to the other side.

Defendant's witness, Shoib (PW2), stated that just before the accident he was riding a motorcycle at about 30 mph behind the plaintiff's motor cycle when the plaintiff's car skidded and encroached onto the plaintiff's path and knocked into the defendant's motorcycle. Under cross-examination he said that at the time of the accident half of the car was on his side of the road and he said he saw the plaintiff trying to avoid the car by swerving to his left. He also stated that when he followed the plaintiff he was travelling near to the left edge (his side) of the road 'but the plaintiff was travelling in the middle of the road on his side'. He said that the plaintiff swerved to his left but the car collided into him. And the plaintiff's motorcycle fell on his side of the road. He too was not asked whether there had been four or five motorcycles proceeding in single file on the road nor whether the first motorcycle in the file had fallen down and as result of which the plaintiff's motorcycle fell too.

The judge did consider the evidence of PW2 but only cursorily and he rejected it only after he found the plaintiff to blame for the accident relying on the former statement of the investigating officer on the ground that as 'a friend of the plaintiff he (ie PW2) would try to cover plaintiff's fault'. The learned judge also failed to observe that his former statement made at the magistrate's court substantiated his testimony. That certainly should be given weight when the judge assessed his evidence.

Now, PW2 had stated that after the plaintiff fell down he too fell down. The judge asked why PW2 should have fallen down and said that PW2 did not give an explanation as to why he fell. The learned judge also did not at all evaluate the evidence of the defendant who gave a conflicting version of the accident. Had he done so he would have seen many inconsistencies in that man's evidence inherent therein and when viewed against his former statement given in the magistrate's court. Instead he took a portion of the defendant's evidence as the truth and used it to reject the evidence of PW2. First he stated:

> Why did PW2 fall down? No explanation from him.
>
> According to PW2, he followed the plaintiff from behind on his motorcycle. But the defendant said that the first motorcycle fell down first but did not knock into his motorcar. It was the second motorcycle which was behind the first motorcycle that skidded, fell down and knocked into his car.

Then, having set out the defendant's story, he accepted it as the truth without more and straightaway came to the conclusion:

> That shows that PW2 fell down first. On seeing PW2 fall down in an attempt to avoid him, he lost control of his motorcycle movement, thus skidded, fell down and caused the collision.

He also said, 'There is no reason for the defendant to lie as to which motorcycle fell down first. He also mentioned that in his police report'. But the point is, the defendant's story was never put to Shoib (PW2) (or for that matter to the plaintiff himself) and the police report of the defendant was made some three hours after the accident and there are discrepancies therein when compared with his former statement before the magistrate and his testimony before the trial judge. Finally the learned judge said, 'I doubt PW2's credibility. He also did not lodge a police report. He could be the cause of the accident.'

Doubting PW2's credibility without giving proper reasons for doing so does not amount to much. The failure to lodge a police report was explained by PW2 – he said he did not lodge one as he was not involved in the accident and he did not think it was necessary to do so and that is a perfectly valid reason. As to the judge's view

that PW2 could probably have been the cause of the accident, that is mere speculation. The court should have evaluated the defence pleaded and the testimony of the defendant. In the statement of defence, the defendant denied the claim of the plaintiff that he was negligent and that his car had encroached onto the plaintiff's path and collided into the plaintiff's motorcycle. The defence was that the collision was caused solely by or contributed substantially by the negligence of the plaintiff and amongst the particulars set out was that there was a failure on the part of the plaintiff to heed the warning and/or signal given by the defendant, that the plaintiff cut across the defendant's path and/or right of way and encroached onto the path and/or right of way of the defendant and his motorcar.

The defendant in his evidence, however, admitted that he did not sound the horn or give a light signal because the accident happened so quickly, and he also admitted that the motorcycle did not cut across his path. In his evidence, too, he stated that as he *approached* the bend he saw four or five motorcycles coming from the opposite direction. The first motorcycle fell and the second motorcycle, the plaintiff's motorcycle, also fell down and collided with his car. He said that after the collision he stopped his car. In his police report, however, he stated that as he *reached* the bend he saw four or five motorcycles reaching the bend and that the first motorcycle fell but did not touch him and that the second motorcycle also fell and was thrown to the right of the motorcycle and that the motorcycle collided into his car.

Under cross-examination he said, however, that as he was *negotiating the bend*, which was a sharp bend (not *approaching* it, as was stated earlier in the police report) he saw the first motorcycle and it was about 200 ft away with the said motorcycle about 20 to 30 ft behind the first one. This is in direct contradiction to what he stated in his police report and in his former statement made before the magistrate. He was asked in the magistrate's court when he first saw the motorcycle – whether it was along the road or after it fell and he said he saw it as it was falling down. Again in his former statement he said that when he saw the first motorcycle fall, (and it will be remembered that earlier in the former statement to the magistrate, as was observed above, he had stated that that was the first time he saw the motorcycle), he did see the said second motorcycle and it was about 30 ft away. If so, this is again inconsistent with his testimony before the judge where he said that he first saw the motorcycles 200 ft away and that the second motorcycle (the plaintiff's motorcycle) was 20 to 30 ft away behind the first.

In his testimony before the judge he also said that the first motorcycle was speeding at 40 mph and that it fell. In contrast, in his former statement he said that the two motorcyclists fell because they were travelling fast and they could not control their vehicles as they were travelling at 60 mph. There is a great difference between a speed of 40 mph and 60 mph. It is not disputed that both motorcyclists had pillion riders with them and apart from the contradiction relating to the speed the second motorcyclist was riding at, it seems improbable that a motorcycle with rider and pillion could go as fast as 60 mph, and it seems to me that his testimony before the judge that the motorcycle was speeding at 40 mph was to make his story more plausible.

Then the defendant said in his testimony that he knew the area was a 'speed limit' area and when confronted with his former statement where he stated it was not, he lamely agreed it was not. All these inconsistencies in his testimony vis-à-vis his former statement and the police report should put any judicial officer on guard when assessing the defendant's evidence. Unfortunately the defendant's version of the accident was accepted without any evaluation after the learned judge found the plaintiff negligent on the basis of the investigating officer's former statement.

The defendant denied that there were only two motorcycles on the road and that his car encroached onto the path of the first motorcycle (ridden by the plaintiff) and collided with it. He said that ten ft after passing the first motorcycle when it fell the second motorcycle collided into his car. His car stopped dead at the spot of collision. He disagreed that his car could not stop dead when travelling at 30 mph even if he had applied his brakes. He, however, changed his story under re-examination and said that when the first motorcycle skidded he applied his emergency brakes and his motorcar moved for a short distance and stopped. The defendant to my mind was not telling the truth when he gave his version of the accident.

In contrast, the plaintiff withstood cross-examination and was consistent. As I have stated earlier his evidence was not assessed by the judge. Had he done so, and had he not been prejudiced by the inadmissible former statement in the magistrate's court of the investigating officer, he would have found it consistent with the story of PW2 whose former statement given at the magistrate's court corroborated what he stated. Both the plaintiff and PW2 were never cross-examined as to the defendant's version of the accident that there were four or five motorcycles, that the first motorcycle fell down, that the defendant avoided the first motorcycle, that the said motorcycle fell and then knocked into his car. Why not, if that was indeed the truth? The story of the plaintiff taken together with the story of PW2 is more consistent and credible. In my view the accident took place when the car of the defendant collided into the motorcycle of the plaintiff on the plaintiff's side. It will be remembered, however, that PW2 stated that just before the

accident the plaintiff was travelling in the middle of the road on his side. From all the evidence that was adduced it is clear that there was no vehicle to the left of the plaintiff and he should have ridden close to the edge of the road. He had no business to be in the middle of the road on his side approaching or at the bend. It was an irresponsible act bearing in mind that he was carrying a pillion rider which made his motorcycle less manoeuvrable and less responsive to evasive action along a bend with a wet road surface. On his own admission the approaching car was not proceeding fast and it seems to me if he had kept close to the left side of the road he was travelling on, the accident could have been avoided. In the circumstances he was equally responsible for the accident and I allowed the appeal on the basis of 50-50 liability. Hearing on the matter of the quantum of damages was adjourned to another date as the parties indicated likely settlement on the amount.

Appeal allowed.

Solicitors: *Jag-Jit Singh & Co*; *Visva & Co.*

Reported by *PS Ranjan*

Tunku Ismail Bin Tunku Md Jewa & Anor v Tetuan Hisham, Sobri & Kadir

HIGH COURT (PENANG) – ORIGINATING SUMMONS NO 31-280-86
WAN ADNAN J
5 APRIL 1989

Agency – Legal assistant having the conduct of day-to-day business of branch – Whether had ostensible authority to give undertaking – Whether undertaking was of a kind which was in the ordinary course of a solicitor's business

Land Law – Conveyancing – Solicitor's usual undertaking to pay sum and provide guarantee upon registration in favour of transferee and bank – Failure to provide guarantee – Application to enforce undertaking

Legal Profession – Solicitor's undertaking – Conveyance of property – Usual undertaking to pay sum and provide guarantee upon registration in favour of transferee and bank – Failure to provide guarantee – Application to enforce undertaking – Effect and nature of undertaking – Whether court could exercise summary jurisdiction over solicitors – Whether undertaking was clear, unqualified and unequivocal

The plaintiffs as administrators of an estate sold to the purchasers a piece of land for $1,038,228. The defendants were solicitors acting for purchasers and the bank. On 16 January 1985 the defendants wrote to the plaintiffs' solicitors, undertaking to pay $450,000 and provide a continuing and irrevocable banker's guarantee for $435,305.20 upon the plaintiffs' solicitors providing the necessary documents and registration of the transfer. The documents were forwarded and the land was duly registered in the purchaser's name on 29 January 1985. The sum of $450,000 was paid but despite requests the defendants failed to furnish the guarantee.

The plaintiffs alleged breach of the undertaking and applied to enforce it. The defendants denied liability on several grounds; firstly, that the undertaking was ambiguous in that the terms and conditions of the guarantee were not stated; secondly, that the legal assistant who carried on the day-to-day business of the branch of the firm in Alor Setar had no actual or ostensible authority to bind the principals; thirdly, the undertaking was given by mistake in that the legal assistant was mistaken into believing that the bank was going to issue the guarantee; fourthly, that the undertaking became impossible to comply; fifthly, that the undertaking was a matter which should not be dealt with summarily as there were issues which should go for trial.

Held, allowing the plaintiffs' application:

(1) The defendants had wanted to register the memorandum of transfer and charge before paying the full price to the plaintiffs because the bank would not release the loan until the charge was registered. To achieve this, the defendants had to give the necessary usual undertakings which was elementary conveyancing practice under the Torrens system. The plaintiffs' solicitors had in their letter acceded to the defendants' request for the necessary documents and clearly stated that the guarantee was to be made in favour of the plaintiffs and payable upon delivery of vacant possession. Any banker's guarantee would be sufficient. On the facts, the defendants' undertaking was clear, unqualified and unequivocal.

(2) The onus of proving ostensible authority rested with the plaintiffs. There can only be ostensible authority to give an undertaking of a kind which was in the ordinary course of a solicitor's business. It was crystal clear that the undertaking in question was within the ordinary course of a solicitors' business that no further proof is required. The undertaking was necessary for the completion of the documentation and registration of the charge which was undertaken by the defendants as solicitors for the bank.

(3) An undertaking would not be enforced if the court is satisfied that the mistake went further than what a solicitor intended or was aware of. In the present case, the solicitor knew the nature and effect of the undertaking and was merely taking risks in giving the undertaking when the guarantee had not come into his hands.

(4) The undertaking had not become impossible to perform as the guarantee could be obtained from any bank and expressed to be payable upon delivery of vacant possession.

(5) A court could exercise summary jurisdiction over solicitors and it extended so far that if a solicitor gave an undertaking in his capacity as a solicitor, the court may order him to perform his undertaking straightaway. This jurisdiction should however be exercised in a clear case.

[*Editorial Note*: The defendants have appealed to the Supreme Court vide Civil Appeal No 02-123 of 1989.]

Cases referred to

1 *Tan Suan Sim* v *Chang Fook Shen* [1980] 2 MLJ 66 (refd)
2 *T Damodaran* v *Choe Kuan Him* [1979] 2 MLJ 267 (refd)
3 *John Fox (a firm)* v *Bannister King & Rigbeys (a firm)* [1987] 1 All ER 737 (refd)